No. 12,438

IN THE

United States Court of Appeals

For the Ninth Circuit

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, Executor of the Last Will and Testament of Sanford Plummer, Deceased; CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, Executor of the Last Will and Testament of Caroline Alice Plummer, Deceased, as an individual and distributee; CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, as trustee and distributee of the Estate of Sanford Plummer, Deceased,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

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Appellants,

vs.

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APPELLANTS' OPENING BRIEF.

JURISDICTIONAL STATEMENT.

Appellants seek the redetermination of a deficiency in Federal estate tax, as determined by the Appellee.

The decedent, Sanford Plummer, a resident of the County of Alameda, State of California, died on the 23rd day of May, 1941.

Crocker First National Bank of San Francisco, a corporation, was and is the duly appointed, qualified and acting Executor of the last will of said Sanford Plummer, deceased, and was co-Executor of said will with Caroline Alice Plummer until her death on the 9th day of December, 1949. Thereafter, and on the 4th day of January, 1950, said Crocker First National Bank of San Francisco became, and now is, the duly appointed, qualified and acting Executor of the last Will of said Caroline Alice Plummer, deceased, and is also a trustee and distributee of the estate of Sanford Plummer, deceased.

Heretofore, and on the 30th day of January, 1950, said Crocker First National Bank of San Francisco reported to this Court the death of said Caroline Alice Plummer, whereupon this Court made an order that this action continue in the names of "Crocker First National Bank of San Francisco, Executor of the Last Will and Testament of Sanford Plummer, deceased; Crocker First National Bank of San Francisco, Executor of the Last Will and Testament of Caroline Alice Plummer, deceased, as an individual and distributee; Crocker First National Bank of San Francisco, as trustee and distributee of the estate of Sanford Plummer, deceased, plaintiffs and appellants, vs. United States of America, defendant and appellee."

A Federal estate tax return for the estate of Sanford Plummer, deceased, was duly filed with the Collector of Internal Revenue for the First Collection District of California, and the tax reported thereon, in the amount of $12,727.46, was paid on the 18th day of June, 1942. (Tr. 9-10.) On the 16th day of December, 1942, Appellee sent a notice of deficiency in respect to estate tax in the sum of $21,874.78 and interest thereon from the 23rd day of August, 1942, to the 12th day of January, 1943, at the rate of 6% thereof, or the sum of $510.40, which said deficiency was paid on the 12th day of January, 1943, making the total estate tax liability paid by Appellants the sum of $34,602.24. (Tr. 11.)

On March 31, 1944, a claim for a refund of said deficiency tax and interest was duly filed with the Collector of Internal Revenue for said First District of California. (Tr. 11.)

Thereafter, and under date of August 31, 1944, Appellants received from the Commissioner of Internal Revenue of the Treasury Department of the United States, a letter, notifying Appellants that their claim for the said refund of the deficiency tax and interest thereon was rejected in its entirety. (Tr. 12.)

Thereafter, and on the 18th day of July, 1946, this action was commenced in the District Court of the United States, in and for the Northern District of California, Southern Division, for the recovery of the amount of the said deficiency tax and for the interest thereon from the time of said payment.

The pleadings necessary to show the existence of jurisdiction are the complaint in said action and the answer thereto.

The said cause was submitted to the District Court for its decision upon the pleadings and an agreed Statement of Facts (Tr. 3-12), and upon the briefs of the parties, whereupon the said District Court made its Findings of Fact (Tr. 3-12 and 19) and Conclusions of Law (Tr. 22, 23) and ordered that the defendant, the Appellee herein, have judgment against the plaintiffs, the Appellants herein, for a dismissal of said action and for defendant's costs. (Tr. 24, 25.)

Thereafter, Appellants made a motion for a new trial, to open the Judgment, amend the Findings of Fact and Conclusions of Law and for the entry of a new Judgment. (Tr. 25.)

Said motions were heard by the Honorable Louis E. Goodman, Judge of said District Court, and on the 22nd day of September, 1949, said motions were severally denied. (Tr. 25.)

On the 30th day of September, 1949, Appellants duly filed their notice of appeal from said Judgment. (Tr. 25, 27.)

STATUTES AND REGULATIONS RELIED UPON.

This case arose under the provisions of the Internal Revenue Code, prior to the effective date of the Revenue Act of 1942.

The law in force as of the time of the death of Sanford Plummer, May 23, 1941, is set forth in Revenue Act of 1926, secs. 300-303:

> "Sec. 302. The value of the gross estate of a decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death."
>
> (26 *U.S.C.A.* p. 224 et seq.)

STATEMENT OF THE CASE, QUESTIONS INVOLVED, AND THE MANNER IN WHICH THEY ARE RAISED.

This case involves the correctness of the ruling of the Commissioner of Internal Revenue and of the decision and the Judgment of the District Court approving the same and fixing the deficiency with respect to the Federal estate tax liability of the estate of the said Sanford Plummer, deceased.

All of the facts, in any way, directly or indirectly, relating to the sole question of law involved, have been agreed upon and are incorporated in the Agreed Statement of the Case on Appeal, filed in the District Court on December 23, 1949, approved by the attorneys for the Appellants and the Appellee and approved by the Honorable Louis E. Gooodman, Judge of the United States District Court on December 23, 1949. (Tr. 2-27.)

In his Order for Judgment (Tr. 20-22), the learned Judge for the District Court has fairly stated, in a few words, that the only issue in this case is the legal effect of a statement made by the deceased, Sanford Plummer, in his last Will, dated September 17, 1939, as follows:

> *"SECOND:* I do hereby declare that all of the property owned or possessed by me has been acquired since my marriage to my wife, Caroline Alice Plummer, and the whole thereof is community property of myself and my wife, Caroline Alice Plummer." (Tr. 8.)

The Judge of the District Court held:

> "In this action, plaintiffs seek refund of estate taxes paid in the sum of $21,874.78 upon the ground that the Commissioner erroneously included in decedent Sanford Plummer's statutory gross estate, the entire value of all property standing in his name at death. (May 23, 1941.) The Commissioner's alleged error, urged in a claim for refund, which was administratively denied, and reasserted here, is that such property was community property since September 17, 1939 (date of decedent's last will) in which decedent's wife had a present, vested and equal interest. The basis of the claim, that the wife had such half interest, is that in his last will, the decedent declared his property to be of the community."
>
> "There is no doubt and both sides so concede, that under California statutes and federal decisions, since July 29th, 1927 in California, the wife has a 'present, existing and equal interest' in community property, and that by agreement

the husband and wife can fix or transmute their property from separate to community or vice versa."

"The sole question here posed is whether the declaration in the decedent's will is equivalent to such an agreement." (Tr. 20, 21.)

With that last statement of the sole question in this case, we wholly agree.

But, from the conclusions drawn from the above by the learned Judge of the District Court, we wholly disagree.

SPECIFICATION OF ERRORS.

The trial Court erred in making the following Finding of Fact:

"XVI.

Not more than twenty per cent of the gross estate of Sanford Plummer, deceased, consisted of community property acquired by himself and his wife subsequent to July 29, 1927, in which she had a present or 'vested' interest at the time of his death." (Tr. 19.)

The trial Court erred in making each and all of its Conclusions of Law, I to VI, inclusive. (Tr. 22-23.)

The aforesaid Findings of Fact and Conclusions of Law are alleged to be erroneous by Appellants for the following reason, succinctly stated:

The statement by the deceased, Sanford Plummer, in his Will, that all of his property was community

property of himself and his wife, had the effect of investing the property with the status of community property, of post-1927 type, in which the wife had a vested one-half interest.

The errors in said Findings of Fact and Conclusions of Law will more fully appear in the Argument of the Case, hereinafter.

PREAMBLE TO ARGUMENT.

While it may seem a work of supererogation to cite authorities supporting principles of law agreed to by all of the parties hereto, nevertheless we shall set forth, hereinafter, supporting authorities of such laws as we deem necessary parts of the entire structure of Appellants' case.

ARGUMENT OF THE CASE.

(1) SINCE JULY 29, 1927, IN CALIFORNIA THE WIFE HAS A PRESENT, EXISTING AND EQUAL INTEREST IN COMMUNITY PROPERTY.

Calif. Civil Code, Sec. 161a;
United States v. Malcolm, 282 U.S. 792;
Sherman v. Commissioner, 9 Cir. 76 Fed. (2d) 810;
Shea v. Commissioner, 9 Cir. 81 Fed. (2d) 937.

(2) BY AGREEMENT, THE HUSBAND AND WIFE CAN FIX OR TRANSMUTE THEIR PROPERTY FROM SEPARATE TO COMMUNITY, OR VICE VERSA, OR FROM PRE-1927 TYPE OF COMMUNITY PROPERTY TO POST-1927 TYPE OF COMMUNITY PROPERTY.

Calif. Civil Code, Sects. 158, 159, 160;

Re Freitas, 16 F. Supp. 557;

Sampson v. Welch, 23 F. Supp. 271;

Kenney v. Kenney, 220 Cal. 134, 30 P. (2d) 398;

Siberell v. Siberell, 214 Cal. 767, 7 P. (2d) 1003.

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(3) THE LEGAL EFFECT OF THE STATEMENT IN DECEDENT'S WILL MUST BE DETERMINED BY THE LAW OF CALIFORNIA.

"The rights of the wife are to be determined by the law of California. Talcott v. United States, 9 Cir., 1928, 23 F. 2d 897; Gillis v. Welch, 9 Cir., 1935, 80 F. 2d 165. If, by this law, at the time of the creation of the trust agreement, and, consequently, at the time of Lewis' death, his wife had acquired a 'present, existing and equal interest' California Civil Code, Sec. 161a, then the deficiency was exacted wrongly. * * *"

Bank of America v. Rogan, 33 F. Supp. 183, at 186.

"Ultimately, the nature of the interest of the wife in community property must be determined, not by reference to the federal tax statutes, but in the light of the property law of California. The management and control, which the husband has under the law of California, does not defeat the

character of the wife's interest as that of a half owner. California Civil Code, Secs. 172, 172a."

Id. p. 188.

---

(4) THE ADMINISTRATION OF DECEDENT'S ESTATE WAS AND IS A PROCEEDING IN REM, AND BINDING ON THE WHOLE WORLD.

The property which decedent and his wife owned on and prior to the 23rd day of May, 1941, was community property, so declared in the decree of final distribution of decedent's estate made by the Superior Court of the State of California, in and for the County of Alameda. (Tr. 8, 9.) Also, so declared by decedent in his Will of September 17, 1939. (Tr. 8.)

"The jurisdiction of the probate court is a jurisdiction in rem. It is established when the appropriate petition has been filed and the notice required by the statute has been given. (Lilliencamp v. Superior Court, 14 Cal. 2d 293, 298 (93 P. 2d 1008); Stiebel v. Roberts, 42 Cal. App. 2d 434, 438 (109 P. 2d 22).)"

Estate of Wise, 34 A.C. 441, 447.

"An heirship proceeding is in rem. (O'Day v. Superior Court, 18 Cal. 2d 540, 544 (116 P. 2d 621); Estate of Horman, 167 Cal. 473, 475 (140 P. 11); Blythe v. Ayres, 102 Cal. 254, 258 (36 P. 522).)"

Estate of Basso, 79 C.A. (2d) 758, 760, 761;

Edlund v. Superior Ct., 209 Cal. 690, 695;

C.C.P. Sec. 1908;

Probate Code Sec. 1021.

(5) THE DECLARATION OF THE DECEDENT IN HIS LAST WILL, DATED SEPTEMBER 17, 1939, THAT ALL OF HIS ESTATE WAS THE COMMUNITY PROPERTY OF HIMSELF AND HIS WIFE, INVESTED ALL OF HIS PROPERTY WITH THE STATUS OF COMMUNITY PROPERTY, IN WHICH THE WIFE HAD A PRESENT, EXISTING AND EQUAL INTEREST.

Viewed either as (a) the equivalent of an agreement, or (b), as a conveyance in the nature of a gift. the legal effect of the declaration is the same, and is as set forth above.

In his letter of August 31, 1944 (Tr. 17-18), the Commissioner of Internal Revenue took the position that "The statement in the decedent's Will, to the effect that all property was acquired since marriage and the whole thereof was community property, is not equivalent to an agreement made during decedent's lifetime transferring separate property into community property, in which the wife had a vested interest." By necessary implication, the Commissioner concedes that if the wife had given her assent to this declaration, it would be the equivalent of the agreement in the case of *Bank of America v. Rogan,* supra, and only one-half of the property would be includible in the gross estate of the decedent.

(a) We contend that the declaration is the equivalent of an agreement, even though the wife did not evidence her consent by subscribing her signature to it, because as the declaration is entirely for her benefit, the law supplies her consent. It cannot be disputed that the declaration conferred an unqualified benefit upon the wife, and this being the case, it will be presumed that the wife expressly accepted and

agreed to the property status thus created, with the same effect as though she had evidenced her acceptance in writing.

The law of California supporting such a construction is stated in many authorities, but particularly in the case of *Herman v. Mortensen,* 72 C.A. (2d) 413. We quote the following from that case (pages 418-419):

> "The second question presented is whether there is evidence of any substantiality to support the implied finding that the grantee accepted or assented to the deed. * * *
>
> There is not a word in the record to indicate that the conveyance was *not* beneficial to the grantee.
>
> Nobody will contend that a grantee is bound to accept or assent to a grant. The reason for the rule with respect to assent has probably never been stated more concisely than it was in *De-Levillain v. Evans,* 39 Cal. 120, 122, as follows: 'In respect to the question of acceptance by the donee as we understand the civil law, it does not differ materially from the common law. Under neither is the donation valid and obligatory until it is accepted. It may be that the donee does not desire to have the property. There may be burdens growing out of the ownership which he does not choose to assume. If he affirmatively declines to accept the donation the law does not force it upon him against his will. This must be so upon every principle of reason and justice. *Nevertheless, in the case of an adult donee, if the donation is for his advantage, he will be presumed to have accepted it unless the contrary appears'.*

(Emphasis added.) This case has never been modified or questioned. * * * (Citing authorities.) It was most recently followed in *Estate of Kalt,* 16 Cal. 2d 807, 813 (108 P. 2d 401, 133 A.L.R. 1424), a case involving an adult, where it is said: 'There is no intrinsic difficulty in regarding a conveyance as effective to vest property in the grantee even before the latter has consented to receive it.' (Tiffany, Real Property, 3d ed. Sec. 1055, p. 253; Brown, Personal Property, Sec. 50; Bogert, Trusts and Trustees, Sec. 150, p. 447.) This principle is recognized by the majority of the courts, including those in California, when they hold that a beneficial gift is presumed to be accepted by the donee even without his knowledge or consent. (See Cal. Civ. Code, Sec. 1059, subd. 2; Neely v. Buster, 50 Cal. App. 695 (195 P. 736); DeLevillain v. Evans, 39 Cal. 120; * * *)''

In the instant case, Mrs. Plummer had nothing to lose and everything to gain from such a declaration in the Will and the creation of such a status. She did not have to do anything about it, affirmatively, to make the declaration binding and final. The law of California did that for her.

It cannot rightly be stated that the contract was "unilateral", merely because the declaration was made in the last Will of the deceased.

Herman v. Mortensen, supra;
Estate of Belknap, 66 C.A. (2d) 644, 651;
Bergman v. Ornbaun, 33 C.A. (2d) 680;
Estate of Jameson, 93 A.C.A. 73, 79, 80.

> "It is well settled that a husband and wife may agree with respect to the character of the property which they hold and that they may transmute their property from one status to another by an agreement which ordinarily need not be executed with any particular formality." (Citing many cases.)
>
> *Estate of Watkins,* 16 Cal. (2d) 793, 797.

In the *Watkins* case, the declarations of the husband and wife were contained in joint wills, executed separately by each of them, and the Court, referring to that situation, stated the following (pp. 797 and 798):

> "A single written instrument may constitute both a will and contract (Security First National Bank v. Stack, 32 Cal. App. (2d) 586, 90 Pac. (2d) 337; Norton v. Estate of Norton, 41 Cal. App. 614, 183 Pac. 214), and we believe that the declarations contained in the joint and mutual will must be held to have constituted an agreement between the spouses *fixing the status of their property as community property.* But even if the declaration found in the joint and mutual will be treated merely as a recital in the written instrument executed by the spouses, the same result must follow as there is a conclusive presumption of 'The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title;' (Code Civ. Proc. sec. 1962, subd. 2)." (Emphasis ours.)

By such declaration in the Will, the status of the community property of the parties to the marriage

became fixed and final, and not subject to change, except by the mutual agreement, written or oral, of the husband and wife; and the declaration, being made after 1927, established the status of the property as of the post-1927 type of community property.

> "When property is given its community character by agreement, it acquires such characteristic the moment the agreement between the spouses is made."
>
> *Bank of America v. Rogan,* supra, at p. 188.

In the last cited case, the agreement between the spouses made no statement that their property was to be treated as post-1927 type of community property. The agreement referred in terms only to Section 687 of the Civil Code of California; yet the Court held that under the provisions of the said agreement, executed after 1927, the wife acquired "an ownership of her own definite enough to warrant its exclusion from the husband's estate."

Id. 189.

(b) The declaration of the testator in effect is a gift to the wife of "a present, existing and equal interest" in their community property. It was not necessarily a contract.

> "The view that assent or acceptance on the part of the grantee is necessary appears to have had its origin, for the most part, in the notion that a conveyance is a contract, and that consequently there must be a meeting of minds. *But a conveyance is not a contract,* and there is no intrinsic difficulty in regarding a conveyance as effective to vest property in the grantee *even be-*

fore the latter has consented to receive it." (Emphasis ours.)

Tiffany on Real Property, p. 253, Sec. 1055;
Estate of Kalt, 16 Cal. (2d) 807, 813.

It is therefore immaterial whether or not the declaration is "unilateral" and also immaterial whether or not any "of the fundamentals of a contract inhered in it". (Words in quotation are from the trial Court's opinion.) (Tr. 21.)

We direct attention, also, to the fact that the Probate Court, in addition to its affirmative finding that the wife was entitled to one-half of all the community property, further found that: "The said Caroline Alice Plummer is entitled to receive and to have distributed to her one-half of the estate of said deceased, without any deduction therefrom by reason of the payment or discharge of any of the legacies or devises created by the provisions of Paragraphs Fourth and Fifth and the various sub-paragraphs of Paragraph Fifth of said will." (Tr. 9.)

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(6) THE DECLARATION OF THE DECEASED HUSBAND LOSES NONE OF ITS FORCE MERELY BECAUSE IT IS CONTAINED IN HIS WILL.

It was stated in the trial Court's opinion that "The will itself was ambulatory." (Tr. 21.)

That is true only of the testamentary provisions in the Will. It is not true of the binding agreement created by the declaration by the husband of the status

of the property and the presumed acceptance of the wife.

It has also been said that "It (meaning the Will) spoke only as of the date of death and could have been revoked and modified at any time". (Tr. 21.)

That is likewise true only of the testamentary provision in the Will. It is not true of those things that the decedent could not change. Having once created a status of the community property, with the presumed acceptance thereof by the wife, the testator could not thereafter change that status to her detriment, without her consent.

Civil Code, Sections 161a, 172, 172a.

> "Whenever a testator refers to *an actually existing state of things,* his language should be held as referring *to the date of the Will* and not to his death, as this is then a prospective event." (Emphasis ours.)
>
> 1 *Redfield on Wills,* 4th Ed., Sec. 30, p. 386.

> "We are not unmindful of the principle that a Will usually speaks as of the time of the death of the testator, yet this is not an unyielding rule. (In re Swenson's Estate, 56 N.W. 1115 (Minn.).) This rule must bend to the plain language of the Will."
>
> *In re May's Estate,* 160 N.W. 790.

The effect of words in a Will, fixing the status of property or persons, is not deferred until the date of death. For example, an acknowledgment in his Will by a testator of an illegitimate child is certainly not

dependent upon the testator's death for it to have efficacy.

> "On the contrary, such an acknowledgment is a confession of the paternity which at once determines the mutuality of rights and obligations derived from the legal family status; and this fact being acknowledged in an authentic document, it is sufficient that it exist for a single moment in order that it may be irrevocably effective."
>
> *Roman v. Agosto,* 27 Porto Rico Reports, 529, at 532.

So, also, in *Medel v. Avecillia,* 15 Philippine Rep. 465, we find this quotation from the second paragraph of the syllabus:

> "The acknowledgment of a debt, in such a Will, by the testator in favor of another person, although the document may be insufficient as a Will because of the lack of some legal formality required to give it validity, is nevertheless sufficient as written and authentic evidence of the existence of the obligation."

The language of the Will in the instant case created a *status* of the community property of the deceased and his wife, as of the date of the execution of the Will.

The effect of a declaration in a Will has been passed upon by the Courts of California favorably to our contention.

In *Kopp v. Gunther,* 95 Cal. 63, at 74, the Court said:

"It is true that the instrument in which the will was written also contained a declaration of trust, to which the acceptance of the trust by defendant referred; but the declaration of trust was as effective after the revocation of the will as before, and would have been equally effective if the will had never been valid as a will; that is, if for want of proper attestation or from some other defect, it had never been legally executed."

In support of the legal effect of a declaration in a Will of a *status,* we refer to the case of *White v. Holden,* 60 S.W. 437 (Tex.), wherein a statement by a testator in his Will that a certain person was his adopted daughter, was held to be sufficient, in the absence of other evidence, to establish such fact.

It has also been held, in California, that the same instrument may operate both as a conveyance and as a Will. In that case, the testator made a declaration in his Will that he had already divided his lands among his sons, which declaration he ratified by the Will. The Court held that title was vested immediately in the sons, and that it was of no consequence that the instrument professed on its face to be a Will.

Adams v. Lansing, 17 Cal. 629.

"A writing may be both a will and a contract."
Norton v. Estate of Norton, 41 Cal. App. 614, at 619.

We submit that the declaration by the decedent of the status of his property was not testamentary in character and it had the legal effect of creating a status of post-1927 community property.

"the separate property of either or both spouses may be transmuted into community property without the necessity of any written agreement, and that the intention of the parties that property held in the name of one or the other is to be considered as community property may be shown by *circumstantial,* as well as, direct evidence. (Estate of Sill, 121 Cal. App. 202, 204 (9 P. 2d 243); Williamson v. Kinney, 52 C.A. (2d) 98, 102 (125 P. (2d) 920); Opp v. Frye, 70 Cal. App. (2d) 478, 486 (161 P. 2d 235).)" (Emphasis ours.)

Frymire v. Brown, 94 A.C.A. 366, 371.

In *Opp v. Frye,* it was stated:

"Aside from some other evidence, we think this will and waiver are sufficient evidence of such an agreement and of the intention of the parties to change the character of any joint tenancy property here in question so as to permit the same to be disposed of by the will."

Opp v. Frye, 70 Cal. App. (2d) 478, 486.

In *Security First National Bank v. Stack,* 32 C.A. (2d) 586, 592, the Court, in referring to the Will of the deceased husband and the waiver by the surviving wife, of any interest contrary to the terms of the Will, stated that:

"The conditions to which the waiver was subject have been fulfilled. The will was never revoked; the agreement was never terminated either by modification, rescission, performance or otherwise. *The will was effective as of the date of death; the agreement was effective from the date*

of its execution. Upon the death of the testator, the agreement, a portion of which is referred to as the waiver and election to take, was as binding upon the defendant widow as the will was upon the executor." (Emphasis ours.)

In the following case the Court held:

"Accordingly, appellants were entitled to prove by any means available to them that Mr. and Mrs. Jameson intended to convert their joint tenancy holdings into community property. If, as is contended, the spouses made companion wills, *a declaration therein with respect to the community character of the property would tend to prove an agreement between them that they intended it to be so classified.* Clearly such a statement by Mr. Jameson under the circumstances here presented would constitute *a declaration against interest and therefore admissible in evidence against him.* (Code Civ. Proc., Sec. 1870, subd. 2.) See, also, Mayfield v. Fidelity & Casualty Co., 16 Cal. App. 2d 611, 617 (61 P. 2d 83).

"Pursuant to Section 738, Code of Civil Procedure, a will, *whether admitted to probate or not is admissible in evidence in an action to determine adverse claims to real or personal property, when the validity or interpretation of a gift, devise, bequest or trust under such will is involved.*" (Emphasis ours.)

Estate of Jameson, 93 A.C.A. 73, 80.

CONCLUSION.

In conclusion, we cannot help but ask ourselves the question: "In the final analysis, what does all the foregoing add up to?"

We can conceive of but one answer; and that answer is alternative in form, viz.: if the conclusion of the District Court is sustained, that the declaration by the husband of the status of their community property, is "unilateral", or is "ambulatory", or "that it spoke only as of the date of death", or "could have been revoked or modified at any time", or that "none of the fundamentals of contract inhered in it", then it must follow as the night the day that all and any declarations in any Will, no matter on what subject they speak, or no matter that they are statements of present existing facts, and no matter to what extent they may be against self-interest, and even though there be not a single iota of contradictory evidence against the truth and intent of such declarations, nevertheless they are only indications of testamentary intentions, to be given no consideration in fixing or helping to fix property rights as between the testator and others or the obligations financial or otherwise, of the declarant.

The alternative to the above is a very much more reasonable answer, and supported by the many authorities hereinabove cited—that all such declarations be given the value to which they are entitled, measured by the circumstances under which they were made, and especially if they are against self-interest of the

declarant, conferring upon another unconditional benefits.

Dated, San Francisco, California,
February 17, 1950.

Respectfully submitted,
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declarant, conferring upon another unconditional benefits.

Dated, San Francisco, California,
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Respectfully submitted,
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